IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 218 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GAJARA NARAN BHURA

Versus

KANBI KUNVERBAI PARBAT W/O. NARAN BHURA

Appearance:

MR AVINASH K MANKAD for Petitioner

MR AVINASH R THAKKAR for MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 19/06/97

ORAL JUDGEMENT

1. Heard learned counsel for the parties. Appellant in this case is the defendant and husband of respondent. Respondent plaintiff filed a suit for maintenance at the rate of Rs.100.00 per month and the maintenance charges Rs.200.00. The suit was dismissed by the learned Civil Judge (Junior Division) Bhuj but in appeal the learned Assistant Judge of Kutch set aside the judgment and

decree of the trial court and decreed the plaintiff's suit to recover sum of Rs.100.00 per month for maintenance from the defendant appellant. Costs of the suit and appeal was also awarded. On being Second Appeal preferred before this Court, the Court while admitting the appeal formulated the following substantial question of law said to be involved for consideration in this case:

"Where the marriage solemnised is in contravention of the provisions of the Child Marriage Restrain Act is void or valid.

The suit was filed on 11.11.1974. The plaintiff's case was that her marriage with the defendant took place in the Samvat Year 2025 according to rites and ceremony of Leuva Kanbi caste and she resided with her husband after marriage. She gave birth to one child whose name is Ramji and who is about one and half years old. The defendant deserted the plaintiff without any reasonable cause by sending her to her parents place and not allowing her to return to her husband's house, though she is ready and willing to reside with her husband. The defendant is not paying maintenance to her. The custody of her child is with the husband. In substance on the ground of husband deserting her without reasonable cause, she claims maintenance with effect from 11.11.1974 while residing separately. The defendant while did not deny the factum of marriage having solemnised but denied the validity of it on the ground that age of wife at the time of marriage was less than 15 years. Plea of divorce was also taken.

2. As noticed above, the suit for maintenance stand decreed by the appellate court and only question which is required to be considered in this appeal is whether marriage solemnised in violation of Child Marriage Restraint Act, 1929 is void, which could be ignored for the purpose of creating any obligation for maintenance. It is not in dispute as is found by the courts below that the plaintiff at the time of her marriage was aged about 10-12 years as per her own admission. It is also not in dispute that husband at the time of marriage was of the marriageable age. That marriage was duly consummated and the relationship of husband and wife subsisted even after attaining the eligible age by the wife which resulted in birth of a child as well.

3. If one looks at the provisions of Child Marriage Restraint Act, 1929, the scheme of the Act envisages that it does not deal with the legality or validity of the

marriage at all. It defines what is meant by child. It also defines child marriage to mean a marriage to which either of the parties in contract is a child. Section 3 makes a male above 18 years but below 18 years contracting child marriage punishable with imprisonment which may extend to 15 days or fine and Section 4 makes the contracting of child marriage by a male above 21 years punishable with simple imprisonment which may extend to three months and fine. Section 5 subjects any person performing, contracting or directing child marriage punishable with simple imprisonment. Section 6 makes a person who is guardian of a minor contracting child marriage liable to punishment with simple imprisonment which may extend to three months and fine. Section 7 to 10 deal with procedural part of taking congnizance of offences and jurisdiction of the court and preliminary enquiries. Section 12 which is of significance for the present purposes empowers the court if it is satisfied on information led before it through a complaint or otherwise that a child marriage in contravention of the Act has been arranged or is about to be solemnised to issue an injunction against any of the persons mentioned in Section 3, 4, 5 and 6 of the Act prohibiting such marriage. Reading of Section 3, 4, 5 and 6 leaves no room of doubt that a person contracting a child marriage has been used with reference to marriage with a girl below the prescribed age only. A girl of eligible age marrying a male child is not punishable under Section 3 and 4, as these provisions apply only to a male marrying a child. Even under Section 6, the words used are where a minor contracts a child marriage. In the context of Section 3 and 4, the phrase can reasonably lead to only one inference that here minor is referable to a male below 18 years of age contracting a child marriage, obviously, with a girl who too is a child, then the person having in charge of minor male has been held liable to punishment. Thus, firstly, it is to be seen that Child Marriage Restraint Act does not make a wife falling in the definition of child liable to contravention of the provisions of the Act.

4. Secondly, Section 12 which envisages on satisfaction by the court to issue an injunction against arranging or solemnising a marriage in contravention of the Act clearly goes to show that there is no statutory declaration of affecting marriage against the marriagae solemnised between the persons defined as child under the Act by itself to proscribe such a child marriage to be solemnised and injunction of the Court is envisaged rather than statutory prohibition under the Act itself.

Had the effect of the Child Marriage Act was to render marriages solemnised between parties who are child was to render void ab initio, the provisions like Section 12 requiring an injunction issued in that regard would not have been there.

5. It is also to be kept in view that marriage in question has been solemnised in Samvat Year 2025, somewhere in 1967 when Hindu Marriage Act has come in force. Parties to the marriage are admittedly Hindus and are governed by Hindu Marriage Act. The legislative field prescribing requisites of a valid marriage, eligible criteria for persons who can contract marriage and effect of any breach of any of the conditions prescribed for a valid marriage has been occupied by Hindu Marriage Act, 1956 and the validity or otherwise of a marriage of Hindus which has been performed by customary rites has to be determined in accordance with the said Act. The provisions of the Hindu Marriage Act puts it beyond the pail of doubt that a marriage solemnised between persons who are not of eligible age and are not in accordance with the provisions of Child Marriage Restraint Act is not void ab initio but can only be avoided in certain circumstances.

Section 5 lays down the conditions for a Hindu Marriage. Sub clause (iii) of Section 5 provides that one of the conditions for solemnising marriage between two Hindus is that the bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of marriage. The respective age for bridegroom and bride prior to its amendment by the Marriage Laws (Amendment) Act, 1976 was 18 years and 15 years. This provision clearly envisaged at the relevant time, for the present purposes, 1969, that a girl who was minor but above fifteen years of age was eligible for solemnisation of a valid marriage according to the Act. Section 11 provides about the absence of conditions which makes the marriage void ab initio and nullity. According to that provision the only conditions in which a marriage solemnised between 2 Hindus is to be treated null and void and a decree to that effect can be made are that (i) other party must not have a spouse living at the time of marriage, (ii) the parties must not be within the degrees of prohibited relationship unless the customary usage governing each of the parties permit marriage between such degrees, (iii) and that parties must not be sapindas of each other which condition is also subject to custom to the contrary. Section 12 deals with voidable marriages inter alia provides that where the consent of the petitioner or where the consent of guardian in

marriage of the petitioner was required as it stood immediately before the commencement of Child Marriage Restraint (Amendment) Act, 1978. The consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or to any material fact or circumstances concerning the respondent is voidable which is further inhibited by the condition that no petition annulling a marriage on the said ground shall be entertained if the petition is presented more than one year after the force has ceased to operate or as the case may be, after discovery of fraud or the petitioner has with his or her full consent lived with other party as husband or wife as the case may be.

6. Section 12 of the Hindu Marriage Act is a complete answer to the contention of the appellant that a marriage contracted in contravention of the provisions of the Child Marriage Restraint Act is void and cannot be considered as valid on any ground. Firstly, it is to be noticed that mere breach of condition (iii) about the age for solemnisation of marriage between two Hindus by itself does not affect the validity of the marriage and no consequence thereto has been provided either under Section 11 or Section 12 of Hindu Marriage Act. The limited ground for avoiding such marriage by seeking declaration of its nullity and decree of annulment by treating it to be voidable is that petitioner's consent or if marriage has been solemnised prior to 1978 and the consent on behalf of minor party of the marriage from his guardian was obtained either by force or by fraud as to the nature of the ceremony or to any material fact or circumstances concerning the respondent. It is not the appellant's case that his consent for marriage was obtained by force or by practicing fraud. He was admittedly adult at the time of marriage and he does not have an option to get the marriage to be annulled by a decree of nullity because his consent as a party to marriage as an adult contracting party was neither obtained by fraud nor by force. Nor his consent was obtained by keeping back from him any information about the age of wife. As a matter of fact subclause (c) of Section 12 (1) only gives an option to the minor contracting party to avoid a marriage by a decree of nullity. Section 12 does not declare the marriage to be void. It only gives an option to concerned party to get a decree for annulment of such marriage by exercise of option to avoid the marriage on conditions aforesaid. Without obtaining a decree of nullity, plea of nullity of marriage could not be taken by the concerned party in defence to a claim for maintenance.

7. If consent of his/her guardian has been obtained by force or by fraud as to the nature of ceremony or to any material fact or circumstance concerning the respondent. In the present case, marriage if at all can be avoided by a decree of nullity it could have been done so by the plaintiff respondent inasmuch as it was she who was minor at the time of marriage and it was her guardian's consent which could have been obtained by force or by fraud. It is not the case of the appellant that his consent was obtained by force or fraud as to the nature of ceremony or any material fact or circumstance concerning husband. As a matter of fact it was known at the time of marriage itself to the appellant that the girl is minor and no fraud about the nature of ceremony or about the material fact or circumstance concerning respondent has either been pleaded or proved. Even that is not enough, this right is also lost if the petition is not filed within one year from the date of discovery of fraud or the cessation of force nor such option of voidability can be exercised once after the force is ceased to operate or fraud has been discovered, the petitioner has with his or her full consent lived with the other party to marriage. Undisputedly, plaintiff and defendant were living together for more than five years with their free will without any duress or fraud. Therefore in fact, in the present case, even the ground for seeking decree of nullity for avoiding marriage do not exist. Suffice for the present purpose, this clearly goes to show that child marriage by itself is not invalid or nullity which could be ignored per se, but it is only in the case of a marriage which has been solemnised contrary to the provisions of Child Marriage Restraint Act, due to operation of force or fraud on concerned party as per Section 12 of Hindu Marriage Act that the marriage become voidable at the instance of petitioner who pleads his consent to such marriage under fraud or force and subject to condition that after solemnisation of marriage the parties have not lived with free consent as husband and wife, after ground for avoiding marriage has ceased to exist. Thus, in no circumstances, the marriage between persons who or one of whom fall within the definition of child within the Child Marriage Restraint Act is void ab initio, but is merely voidable under the circumstances not under the provisions of Child Marriage Restraint Act but under the provisions of Section 12(1)(c) of Hindu Marriage Act.

8. There is yet another provision under the Hindu Marriage Act which supports the view that marriage solemnised in breach of the provisions of Child Marriage Restraint Act is not void. Section 13 of Hindu Marriage

Act which deals with the circumstances in which a party to the Marriage Act seek dissolution of a decree for divorce inter alia provide an exclusive ground to wife to seek dissolution of marriage by a decree of divorce in case her marriage was solemnised before attaining the age of 15 years whether marriage has been consummated or not if she has repudiated the marriage after attaining 15 years of age but before attaining the age of 18 years. Thus an adult male marrying child girl neither gets a right to repudiate the marriage for seeking decree for dissolution of marriage nor he has right to exercise option to avoid marriage by treating it voidable except in case he comes in the category of a petitioner whose consent to the marriage has been obtained by force or by practising fraud about solemnisation of the marriage or facts about the respondent spouse.

9. In the case of Birupakshya Das v. Kunja Behari AIR 1961 Orissa 104, the Orissa High Court has taken the view that the Child Marriage Restraint Act, 1929 does not affect the validity of the marriage even though it could be in contravention of the Act. It was of the opinion that in respect of the marriage being valid the legislature disproves of such marriages and performance of such marriages punishable under the law.

A Full Bench of Andhra Pradesh High Court in Pinninti Venkataramana and another v. State reported in AIR 1977 AP 43 had taken the view that marriage in contravention of clause (3) of Section 2 of Hindu Marriage Act (which prescribes respective age for bride and bridegroom) is neither void nor voidable though contravention of which may be punishable under Section 18 of the Hindu Marriage Act. It has also taken the view that a marriage solemnised in contravention of the provisions as to the age is subject to only consequences as are provided under Clause (iv) of sub-section (2) of Section 13 as inserted by Hindu Marriage Laws Amendment Act, 1976. No other consequence of breach of condition as to age has been provided affecting the validity of marriage.

A Division Bench of Madhya Pradesh High Court in in AIR 1976 MP 83 has similarly held that a marriage solemnised in contravention of age mentioned in Section 5(iii) is neither void ab initio nor even voidable. Such violation of section 5(iii) does not find place either in Section 11 or in Section 12 of the Act. It is only punishable as an offence under Section 18. The marriage solemnized would remain valid, enforceable and recognizable in courts of law.

Without multiplying the decisions, it may be noticed that similar view has been expressed by High Courts of Punjab and Haryana in Mohinder Kaur v. Major Singh reported in AIR 1972 P&H 184; Orissa High Court in Duriyodhan Pradhan v. Bengabati Dei reported in AIR 1977 Orissa 36; Himachal Pradesh High Court in Smt. Naumi v. Narotam and another reported in AIR 1963 HP 15 and Allahabad High Court in AIR 1969 All. 1623.

10. Though the aforesaid decisions have been rendered in the context of provisions of Section 5(iii) of the Hindu Marriage Act, but it gives enough clue to the underlying legislative policy while disproving the marriage between parties before attaining particular age of marriage, but at the same time marriage solemnized in breach of such policy is not to be considered invalid, which position has been further clarified and strengthened by insertion of clause (c) in Section 12(1) of the Hindu Marriage Act, provided specific consequence of marriage solemnised in breach of Child Marriage Restraint Act by confining its effect only in cases where consent has been obtained by fraud or under force, and permitting only in case of marriage of minor girl below the age of 15 years to avoid marriage by exercising option attaining eighteen years of age.

11. As a result of aforesaid discussion, I am of the opinion that marriage solemnised between two Hindus who are of the age which makes one of them punishable under the Child Marriage Restraint Act does not render the marriage itself invalid, or void. Therefore rights and obligations arising from such valid marriage cannot be avoided by not recognising the marriage at all. No other point has been urged before me.

As a result, this appeal fails and is hereby dismissed with costs throughout.

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